STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

ARMADA OIL, CO, LLC,
Plaintiff,

v. **Case No. 13-134391-CK**
Hon. James M. Alexander

BARRICK ENTERPRISES, INC,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for summary disposition. Plaintiff is a motor fuel hauling company. Defendant is a fuel supplier and distributor for fueling stations.

In September 2009, non-party Armada Oil & Gas Company (Armada Gas) was experiencing financial troubles and found it necessary to assign all of its BP-branded dealer accounts to Defendant. On September 11, 2009, Armada Gas and Defendant memorialized the transfer in a written Assignment. The accounts consisted of 133 BP gas stations.

On October 17, 2009, principals of Plaintiff and Defendant met and signed a handwritten "Agreement," which provides in full:

(1) Armada to haul product pursuant to contract
(2) AJ & Allie to provide all dealer contracts to Barrick on Monday 10-19-09
(3) On all transfer customers Barrick & AOG split profit 50-50 after costs

This "Agreement" has three signatures at the bottom – Allie Berry, Ali Jawad, and Robert Barrick. Mr. Berry and Mr. Jawad are officers of Plaintiff, and Mr. Barrick is Defendant's President. The document contains no designation whether the parties signed in their individual capacity or as agents of a corporation.

Under the terms of an April 2010 "Global Settlement Agreement" that resolved two federal lawsuits involving Armada Gas, Defendant retained 51 of the stations, returning the rest to Armada Gas. Defendant paid Armada Gas $1.5 million to retain these accounts.

It is Plaintiff's position that the handwritten "Agreement" required Defendant to use Plaintiff for all hauling needs for the Armada Gas transferred customers starting on the date of the agreement, with the parties splitting all profits 50-50. Around the same time as the handwritten "Agreement," the parties exchanged drafts of a more formal hauling agreement, but the parties never executed any such agreement.

According to Plaintiff's own Invoices, on October 23, 2009 (only six days after the handwritten "Agreement"), Plaintiff began making deliveries for Defendant – billing $0.02 per gallon hauled. Plaintiff continued making deliveries for Defendant through May 2010, and Defendant paid each invoice at a total of $512,447.19.

In its Complaint, Plaintiff alleges that Defendant breached the handwritten "Agreement" by using its own carriers to make fuel deliveries and by failing to split profits for the transferred customers.

Although Plaintiff's claims seem fairly straight forward, it filed a nine-count Complaint, alleging: (1) Breach of the Agreement; (2) Third-Party Beneficiary – Breach of Contract; (3) Fraud and Intentional Misrepresentation; (4) Promissory Estoppel; (5) Unjust Enrichment; (6) Statutory Conversion; (7) Common Law Conversion; (8) Specific Performance; and (9) Action for Accounting.

Defendant now seeks summary disposition under MCR 2.116(C)(7), (C)(8) or (C)(10). A motion under (C)(7) determines whether a claim is barred, among other grounds, by a statute of limitations. MCR 2.116(C)(7). A motion under MCR 2.116(C)(8) tests the legal sufficiency of

the complaint, and a motion under MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In its Response, Plaintiff seeks summary disposition of its Count I under MCR 2.116(I)(2).

Defendant argues that it is entitled to summary disposition for several reasons. It makes sense to first address Defendant's argument that the handwritten "Agreement" lacks a meeting of the minds necessary to form a binding contract. In support, Defendant cites *Burkhardt v Bailey*, 260 Mich App 636; 680 NW2d 453 (2004), for the notion that "a fundamental tenet of all contracts is the existence of mutual assent or a meeting of the minds on all essential terms of a contract." *Burkhardt*, 260 Mich App at 655.

Indeed, in order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

The existence of a valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006).

A simple review of the handwritten "Agreement" reveals that it is missing several essential terms, such as duration, method of termination, scope, payment method, and exclusivity. Additionally, the terms that are present are unclear. For example, the first provision, "Armada to haul product pursuant to contract," references another contract. But it isn't clear which one.

Further, although Plaintiff claims that it was to receive a 50-50 split of the profits, it only billed $0.02 per gallon hauled, which Defendant paid. And Plaintiff did so within a week of the handwritten "Agreement." This conduct is consistent with the terms contained in the formal draft

agreements circulated around the same time. Plaintiff continued to bill at that rate for the entirety of the time that it hauled for Defendant.

The Court finds that the handwritten "Agreement" is, at best, nothing more than a letter of intent to enter into a formal agreement. The October 17, 2009 writing lacks many material and necessary terms to form a "meeting of the minds." Because no reasonable trier of fact could determine that this agreement contains all essential terms, it cannot be considered an enforceable contract. See *Prof Facilities Corp v Marks*, 373 Mich 673, 679; 131 NW2d 60 (1964); *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988). The agreement is so lacking that the trier of fact could do nothing more than guess at the intent of the parties.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute and Defendant is entitled to judgment on Plaintiff's breach of contract claim (Count I) under (C)(10) as a matter of law.[1]

Next, and for a similar reason, Plaintiff's claim for promissory estoppel also fails. This is so because "[p]romissory estoppel requires an actual, clear, and definite promise." *Ypsilanti Township v General Motors Corporation*, 201 Mich App 128, 133-134; 506 NW2d 556 (1993), citing *State Bank of Standish v Curry*, 442 Mich 76, 84-85; 500 NW2d 104 (1993). Plaintiff has failed to produce sufficient evidence of any definite promise to survive summary disposition. As a result, summary disposition of this claim (Count IV) is also appropriate.

Next, Defendant argues that it is entitled to summary disposition of Plaintiff's claim for unjust enrichment because Defendant paid each of Plaintiff's invoices for fuel hauling. The

[1] Because the Court has concluded that no contract existed, Plaintiff's claim for specific performance of the same (Count VIII), Third-Party Beneficiary based on the same (Count II), and an Accounting based on the same (Count IX) also fail.

Court agrees. In fact, in its Response, Plaintiff admits that it "does not allege any unjust enrichment on these deliveries." Rather, Plaintiff claims unjust enrichment based on a failure to split profits. But, as the Court concluded, there was never any such agreement. As a result, Defendant is entitled to summary disposition of Plaintiff's Count V.

Next, Defendant claims that it is entitled to summary disposition of Plaintiff's conversion claims. The statute of limitations for conversion is three years. MCL 600.5805(10). In its Complaint, Plaintiff alleges that Defendant converted specific monies that it was entitled to under the 50-50 profit split beginning on October 17, 2009.

But Plaintiff did not file its Compliant until June 2013 – more than three years after its claim allegedly accrued. As a result, Defendant is entitled to summary disposition of Plaintiff's Counts VI and VII under MCR 2.116(C)(7).

Alternatively, to support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to its care. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App. 94, 111; 593 NW2d 595 (1999). Here, Plaintiff has failed to allege that Defendant had the obligation to return that "specific" and "precise" money. *Anderson v Reeve*, 352 Mich 65, 70; 88 NW2d 549 (1958); and *Head*, 234 Mich App at 111-112. As a result, summary disposition under of Plaintiff's Conversion claims (Counts VI and VII) is also appropriate under (C)(8).

Finally, Defendant argues that it is entitled to summary disposition of Plaintiff's Count III for fraud and intentional misrepresentation because "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Plaintiff responds that this case falls within the "bad faith" exception. Under this doctrine, "a fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance." *Hi-Way Motor*, 398 Mich at 337-338. Plaintiff, however, fails to offer anything other than unsupported conclusions that Defendant made promises with no intent to perform. And, as stated, the handwritten "Agreement" simply evidences one piece of the parties' negotiations – with no such 50-50 promise contained in the formal drafts that followed. As a result, Defendant is entitled to summary disposition of Plaintiff's Count III under (C)(10).

To summarize and for all of the above reasons, Defendant is entitled to summary disposition of Plaintiff's Complaint, and the same is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

April 16, 2014 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge